



March 31, 1997

Hand Delivered

ADEM Hearing Officer
Office of General Counsel
Alabama Department of Environmental Management
1751 Cong. W.L. Dickinson Drive
Montgomery, Alabama 36109-2608

Re: **Proposed Alabama Water Use Classifications, Rule 335-6-11-.02**

The Legal Environmental Assistance Foundation, Inc. (LEAF) submits these comments in response to the "Notice of Rulemaking" published on February 5, 1997. The import of these comments is that the present use classifications assigned to many of the water segments identified in the "Notice of Rulemaking" and many water segments not identified in the "Notice of Rulemaking" are *de facto* waste transport or waste assimilation use classifications which are prohibited under 40 C.F.R. § 131.10(a). Accordingly, LEAF submits that the present use classifications may not be retained.

I. Permissible and Prohibited Water Use Classifications

40 C.F.R. § 131.10(a) provides:

Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of the water for public water supply, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. *In no case shall a State adopt waste transport or waste assimilation as a designated use* for any waters of the United States.

(Emphasis added). See also *Water Quality Standards Handbook: Second Edition* (EPA-823-B-94-005a, August 1994) at 2-1. The U.S. Environmental Protection Agency explains the foregoing prohibition as follows:

A basic policy of the standards program throughout its history has been that the designation of a water body for the purposes of waste transport or waste assimilation is unacceptable. At the public's suggestion, an explicit statement of this

policy has been added to § 131.10(a). The objective is to prevent water bodies from being used as open sewers.

48 Fed. Reg. 51410 (1983). The prohibition against waste transport and waste assimilation water use designations cannot be circumvented by the device of clever nomenclature.

II. Waters Do Not Have Use and Value for Agricultural and Industrial Water Supply/Industrial Operations

A. *Agricultural and Industrial Water Supply/Industrial Operations Classifications Are Intended To Be "Supply" Use Classifications*

The Agricultural and Industrial Water Supply (A&I) use classification adopted by the State of Alabama is described as "[a]gricultural irrigation, livestock watering, industrial cooling and process water supplies, and any other usage except fishing, bathing, recreational activities, including water-contact sports, or as a source of water supply for drinking or food-processing purposes." ADEM Admin. Code R. 335-6-10-.09(5). The Industrial Operations (IO) use classification adopted by the State of Alabama is described as "[i]ndustrial cooling and process water supplies, and any other usage, except fishing, bathing, recreational activities including water-contact sports or as a source of water supply for drinking or food-processing purposes." ADEM Admin. Code R. 335-6-10-.09(6). These classifications are intended for agricultural and industrial water "supply" uses, not agricultural and industrial waste disposal uses.

B. *Historical and Present Agricultural or Industrial Supply Uses are Absent*

LEAF has not been able to identify any past or present (1973-1997) *bona fide* Agricultural and Industrial Water Supply or Industrial Operations *supply* uses of the waters identified in the "Notice of Rulemaking" or of other waters designated Agricultural and Industrial Water Supply or Industrial Operations. Rather, these waters have been and are being used for municipal and industrial waste transport and waste assimilation. See III., B., below.

C. *Future Agricultural or Industrial Supply Uses are Doubtful*

The absence of present and historical *bona fide* Agricultural and Industrial Water Supply or Industrial Operations *supply* uses of these waters for 24 years suggests that such uses are not likely in the future as well. Absent an affirmative and convincing demonstration that future uses are likely to include Agricultural and Industrial Water Supply or Industrial Operations *supply* uses, the historical absence of such uses for the last 24 years is convincing evidence that the designation is not appropriate, taking into consideration the uses and values of the waters.

III. Waters Are Designated to Accommodate Waste Transport and Waste Assimilation Uses

A. *Prior Use Designations were "Treated Waste Transportation"*

The waters identified in the following table were previously (1973) classified for "Treated Waste Transportation" and later reclassified for "Agricultural and Industrial Water Supply" or "Industrial Operations." These reclassifications did not represent any change in the use or value of

Water Segment	1973 Use Classification	Present Classification
Five Mile Creek (from Coalburg to Ketona)	Treated Waste Transportation	Agricultural and Industrial Water Supply
Opossum Creek	Treated Waste Transportation	Industrial Operations
Pepperell Branch	Treated Waste Transportation	Agricultural and Industrial Water Supply
Shirtee Creek	Treated Waste Transportation	Agricultural and Industrial Water Supply
Valley Creek (from County road crossing 1½ miles NE of Johns to Opossum Creek)	Treated Waste Transportation	Industrial Operations
Village Creek (from Bayview Lake to its source)	Treated Waste Transportation	Agricultural and Industrial Water Supply

the waters for agricultural irrigation, livestock watering, or industrial cooling and process water supplies. Rather, these reclassifications were effected to give the appearance of compliance with the prohibition against classifications of waste transport and waste assimilation and to authorize the maintenance of sufficiently low water quality standards to accommodate continued waste transport and waste assimilation without imposing additional treatment requirements on municipal and industrial discharges.

B. *Relative Flows of Water and Waste Indicate Use for Waste Transport and Waste Assimilation*

Another indicator that the classifications of some of the waters identified and not identified in the "Notice of Rulemaking" are *de facto* classifications of waste transport and waste assimilation is the extent to which the waters are dominated by waste discharges. The table below indicates the percentage of the low stream flow which is wastewater (data could not be obtained on all stream segments in time to include in these comments).

Water Segment	Low (7Q10) Stream Flow	Design Waste Flow	Percent Waste Flow	Municipal or Industrial Discharger
Buck Creek (from Cahaba Valley Creek to Shelby County Road 44: 5.9 miles)	0.0 cfs (0.0 mgd)	4.6 cfs (3.0 mgd)	100%	City of Alabaster Alabaster WWTP NPDES AL0025828 (exp. 5-31-00)
Cane Creek/Oakman (from County Road crossing 2.5 miles southeast of Oakman to Alabama Highway 69: 2.7 miles)	0.0 cfs (0.0 mgd)	0.14 cfs (0.09 mgd)	100%	City of Oakman Oakman WWTP NPDES AL0025348 (exp. 3-31-99)
Cane Creek/Jasper (from Mulberry Fork to Town Creek: 9.5 miles)	3.6 cfs (2.3 mgd)	7.43 cfs (4.8 mgd)	67.4%	Jasper WW&SB, Inc. Jasper WWTP NPDES AL0023418 (exp. 2-28-96)
Chickasaw Creek (from Mobile River to limit of tidal effects (Hwy 43): 4.5 miles)	?	?	?	City of Chickasaw Utilities Board Chickasaw Lagoon NPDES AL0020885 (exp. 2-28-99) (1.5 mgd)
				Shell Oil Company Molibe Site NPDES AL0055859 (exp. 6-30-98) (mgd)
				Occidental Chemical Corp. Mobile Plant NPDES AL0003514 (exp. 1-31-99) (0.5 mgd)
				UOP Molecular Sieve Plant NPDES AL0002666 (exp. 9-30-97) (1.0 mgd)

Five Mile Creek (from Newfound Creek to Katona: 19.6 miles)	?	?	?	Sloss Industries Corp. NPDES AL0003247 (exp. 9-30-98) (4.223 mgd)
				Drummond Company, Inc. ABC Coke Division NPDES AL0003417 (exp. 8-31-99) (0.123 mgd)
				Southern Natural Gas, Inc. NPDES AL0066648 (exp.) (mgd)
				Jefferson County Comm'n Five Mile WWTP NPDES AL0026913 (exp. 9-30-97) (10.0 mgd)
				Forestdale Mobile Home Park NPDES AL0027642 (exp.) (mgd)
				Sharon Heights Mobile Home Park NPDES AL0056707 (exp.) (mgd)
Flint Creek (from Alabama Highway 36 to Shoal Creek: 9.9 miles)	0.9 cfs (0.58 mgd)	4.18 cfs (2.7 mgd)	82.3%	City of Hartselle Utilities Board Hartselle WWTP NPDES AL0054674 (exp. 11-30-97)
Lost Creek (from Downey Branch to US Hwy 78 crossing one mile southeast of Carbon Hill to its source: miles)	0.012 cfs (0.007mgd)	1.24 cfs (0.8 mgd)	99.0%	City of Carbon Hill Utility Board Carbon Hill WWTP NPDES AL0024341 (exp. 5-31-00)

Mobile River (from its mouth to Spanish River: 7.6 miles)	?	?	?	International Paper Co. Mobile Mill NPDES AL0002780 (exp. 9-30-98) (30.7 mgd)
				Kimberly Clark Tissue Company NPDES AL0002801 (exp. 9-30-98) (mgd)
Opossum Creek (from Valley Creek to its source: 8.5 miles)	0.36 cfs (0.23 mgd)	17.44 cfs (11.27 mgd)	98.0%	USX Corp. Fairfield Works NPDES AL0003646 (exp. 1-31-00) (11mgd)
				Koppers Industries, Inc. Woodward Facility NPDES AL0000680 (exp. 4-30-99) (0.036 mgd)
				Koppers Industries, Inc. Woodward Tar Plant NPDES AL0003221 (exp. 10-31-01) (0.236 mgd)
Pepperell Branch (from Sougahatchee Creek to its source: 4.5 miles)	0.51 cfs (0.33 mgd)	4.26 cfs (2.75 mgd)	89.3%	West Point Stevens Opelika Filter Plant NPDES AL0024198 (exp. 12-31-99)
				West Point Stevens Griffex Chemicals NPDES AL0001074 (exp. 10-31-00)
				West Point Stevens Opelika Finishing Plant NPDES AL0002968 (exp. 3-31-97)

Shirtee Creek (from Tallassee hatchee Creek to its source: miles)	?	6.8 cfs (4.4 mgd)	?	Avondale Mills, Inc. Eva Jane Plant NPDES AL0001627 (exp. 10-31-96) (2.0 mgd)
				Utilities Bd. Sylacauga J. Earl Ham WWTP NPDES AL0020001 (exp. 5-31-98) (2.4 mgd)
Three Mile Creek (from Mobile River to Mobile Street: 5.4 miles)	?	?	?	WWSB City of Pritchard Carlos A. Morris WWTP NPDES AL0023205 (exp. 2-28-99) (4.0 mgd)
				Mobile Water & Sewer Board Smith WWTP NPDES AL0023094 (exp. 9-30-98) (12.8 mgd)
				Cavenham Forest Industries NPDES AL0001104 (exp. 9-30-01) (mgd)
Town Creek (from Cane Creek to 100 yards upstream of Southern Railway crossing: 1.0 miles)	1.6 cfs (1.03 mgd)	7.43 cfs (4.8 mgd)	82.3%	Jasper WW&SB, Inc. Jasper WWTP NPDES AL0023418 (exp. 2-28-96)
Valley Creek (from head of backwater above Bankhead Lock and Dam to County road crossing 1½ miles northeast of Johns: miles)	?	?	?	?
Valley Creek (from County road crossing 1½ miles northeast of Johns to Opossum Creek: 9.8 miles)	1.59 cfs (1.03 mgd)	100.6 cfs (65.03 mgd)	98.4%	Jefferson County Comm'n Valley Creek WWTP NPDES AL0023655 (exp. 11-30-99) (65 mgd)
				Birmingham Hide & Tallow Co. NPDES AL0002704 (exp. 3-31-97) (0.032 mgd)
Valley Creek (from Opossum Creek to its source: miles)	?	?	?	?

Village Creek (from Bayview Lake to its source: 23.3 miles)	?	?	?	Allied Signal, Inc. Fairfield Facility NPDES AL0002097 (exp. 3-31-99) (0.06 mgd)
				A&B Foundry, Inc. NPDES AL0003409 (exp.) (mgd)
				Birmingham Steel Corp. NPDES AL0003735 (exp. 5-31-97) (0.72 mgd)
				Ashland Chemical Co. NPDES AL0021695 (exp. 5-31-98) (mgd)
				American Cast Iron Pipe Company NPDES AL0029378 (exp. 9-30-98) (mgd)
				Industrial Chemicals, Inc. NPDES AL0031721 (exp. 8-31-97) (mgd)
				Groundwater Technology, Inc. NPDES AL0062537 (exp. 10-31-96) (0.014 mgd)
				Chemac NPDES AL0063801 (exp. 7-31-97) (mgd)
				Jefferson County Comm'n Village Creek WWTP NPDES AL0023647 (exp. 12-31-00) (40.0 mgd)
				Jefferson County Bd. Ed. Minor Jr. High School NPDES AL0051209 (exp. 6-30-01) (0.035 mgd)

C. *But For Waste Discharges, Waters Would Not Be Classified As Agricultural and Industrial Water Supply or Industrial Operations*

LEAF further submits that but for the existence of municipal and industrial waste discharges to these waters, the waters would have been classified for Fish and Wildlife uses (i.e., fishing, propagation of fish, aquatic life, and wildlife). Absent the industrial and municipal waste discharges located on these waters, most of these waters would achieve a level of quality sufficient to support Fish and Wildlife uses. These facts further suggest that the present classifications are designed to accommodate waste transport and waste assimilation.

IV. **Conclusion**

LEAF submits that the weight of the evidence suggests that the State of Alabama is using the Agricultural and Industrial Water Supply and Industrial Operations classifications as a means to accommodate waste transport and waste assimilation and to circumvent the prohibition against waste transport and waste assimilation designations in 40 C.F.R. § 131.10(a). Accordingly, the designation of these waters should be revised.

Sincerely,

A handwritten signature in black ink, appearing to read "David Ludder", written in a cursive style.

David A. Ludder
General Counsel

**WATER SEGMENTS PRESENTLY CLASSIFIED
AGRICULTURAL AND INDUSTRIAL WATER SUPPLY AND
PROPOSED IN ADEM RULE AMENDMENTS TO REMAIN UNCHANGED**

Water Segment	Low (7Q10) Stream Flow	Design Waste Flow	Percent Waste Flow	Municipal or Industrial Discharger
Buck Creek (from Cahaba Valley Creek to Shelby County Road 44: 5.9 miles)	0.0 cfs (0.0 mgd)	4.6 cfs (3.0 mgd)	100%	City of Alabaster Alabaster WWTP NPDES AL0025828 (exp. 5-31-00)
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				Chemac NPDES AL0063801 (exp. 7-31-97) (mgd)
<i>continued</i>				

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